91-851

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

ROSEMARY M. MEDLEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

MICHAEL D. BURT
Captain, Air Force Legal Services Agency
United States Air Force
AFLSA/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

JEFFREY R. OWENS
Colonel, Air Force Legal Services Agency
United States Air Force
Counsel for Petitioner

December 1991

QUESTION PRESENTED

Whether petitioner's right to avoid compulsory self-incrimination under the Fifth Amendment to the United States Constitution was violated by her conviction for failing to report to military authorities the drug use of those with whom she had used drugs.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

United States Supreme Court Decisions:

Federal Circuit Court of Appeals Decisions:

United States Court of Military Appeals Decisions:

CASES – Continued: Page

Courts of Military Review Decisions:

State Court Authorities:

CONSTITUTIONAL PROVISIONS:

STATUTORY AUTHORITIES:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

ROSEMARY M. MEDLEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Rosemary M. Medley, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in her case on September 4, 1991.

OPINIONS BELOW

The United States Air Force Court of Military Review issued its reported decision affirming petitioner's conviction for dereliction of duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892 (1988) and wrongful use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (1988) on April 18, 1990. *United States v. Medley*, 30 M.J. 879 (A.F.C.M.R. 1990) (Appendix A). (The court also set aside a specification alleging dereliction of duty.) The decision of the United States Court of Military Appeals affirming the Air Force Court of Military Review is reported at 33 M.J. 75 (C.M.A. 1991) (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on September 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (1988) and 10 U.S.C. § 867(h) (Supp. 1990).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the Constitution of the United States provides in pertinent part:

> No person shall . . . be compelled in any criminal case to be a witness against himself . . .

STATEMENT OF THE CASE

Petitioner was convicted, contrary to her pleas, of wrongful use of cocaine (Additional Charge I) and dereliction of duty for failure to report those military members with whom she allegedly had used the drugs (Additional Charge II).

The evidence against petitioner consisted of the testimony of four military members: Technical Sergeant (TSgt) Ennis Wallace, Staff Sergeant (SSgt) Michael Banks, Airman (Amn) Sandra Fairley, and Airman Basic (AB) Andra Riles. All of these witnesses were admitted drug abusers charged with similar offenses who testified under grants of immunity that petitioner had used with them. Petitioner was apparently aware of these and other instances when this group of individuals had used illegal narcotics. She did not inform any military or law enforcement authorities of this knowledge.

The parties stipulated that Air Force Regulations impose an affirmative obligation on noncommissioned officers to disclose such knowledge.

The Air Force Court of Military Review concluded that petitioner's conviction for dereliction of that duty for failing to report the drug use of those with whom she had used drugs with respect to the times when she actually used drugs herself could not stand. The court found that requiring such a disclosure trampled petitioner's right to be free from compulsory self-incrimination. The court, however, affirmed findings of guilt for dereliction of duty relating to her failure to inform on her friends regarding times when she was present, but did not personally use drugs. The United States Court of Military Appeals affirmed the decision of the Air Force Court of Military Review.

Such additional facts as may be necessary to the disposition of this matter are contained in the reasons for granting the writ, *infra*.

REASONS FOR GRANTING THE WRIT

The requested Writ is appropriate in this case because the requirement that a service member report the drug abuse of those with whom that person has used drugs blatantly violates the constitutional rights of that member.

No person in a criminal case may be compelled to be a witness against himself. U.S. Const., amend. V; *Miranda v. Arizona*, 384 U.S. 436 (1966). The fundamental right of an individual to be free from compulsory self-incrimination is applicable to service members as well as civilians. *See United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983). The Uniform Code of Military Justice specifically provides that "[n]o person subject to this chapter may compel any person to incriminate himself or to answer any question *the answer to which may tend to incriminate him.*" Article 31(a), UCMJ, 10 U.S.C. § 831 (1988) (emphasis added).

In *Marchetti v. United States*, 390 U.S. 39 (1968), this Court held that the privilege against self-incrimination protected an individual from prosecution for failing to report to the Internal Revenue Service income derived from illegal gambling activities. *See Grosso v. United States*, 390 U.S. 62 (1968); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965); *see generally United States v. Tyson*, 2 M.J. 583 (N.M.C.M.R. 1976). This Court focused on whether the hazard of self-incrimination was "real and appreciable" and held that it was the substantiality of the risk that the disclosure would result in self-incrimination that controls the applicability of the Fifth Amendment's protection. *Marchetti*, at 53; *see California v. Byers*, 402 U.S. 424 (1971); *Hoffman v. United States*, 341 U.S. 479 (1951). Because, as in the case at bar, Marchetti's statements were to be made readily available to law enforcement officials, this Court concluded that the risk was so substantial as to require reversal of the conviction.

The protections of the Fifth Amendment extend, not only to statements that would in themselves support conviction, but, likewise, to those which would furnish links in the chain of evidence that could lead to prosecution, provided that the individual has reasonable cause to believe that he might thereby be convicted of a crime. *Hoffman, supra*, at 486; *United States v. Kuh*, 541 F.2d 672 (7th Cir. 1976).

Military law enforcement personnel may not use a regulatory disclosure requirement to subvert a member's right to be free from compulsory self-incrimination or as a pretext for obtaining evidence of crimes in violation of the Fifth Amendment. *United States v. Lee*, 25 M.J. 457 (C.M.A. 1988). In *Lee*, the United States Court of Military Appeals held that military authorities could not use a "show and tell" regulation, requiring the disclosure

of all duty free goods possessed by a member in the Republic of Korea, to compel the disclosure of incriminating information otherwise protected by the Fifth Amemdment and Article 31, UCMJ.

This case is dissimilar to *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549 (1990), in which this Court determined that the Fifth Amendment did not protect a mother from complying with a court order, pursuant to State social services regulations, to produce the body of her infant son. (The Court expressly left open the uses to which testimonial evidence derived from Bouknight's disclosures could be put). In *Bouknight*, this Court found that the State's regulatory scheme promoted state interests unrelated to the enforcement of its criminal laws. *See California v. Byers, supra.* (In vigorous dissent, Justices Marshall and Brennan found that the required disclosure rode roughshod over Bouknight's constitutional right to be free from compelled self-incrimination). In the case at bar, however, petitioner was convicted of dereliction for failure to follow a regulatory directive that she reveal criminal conduct of which she was aware. As in *Marchetti, supra*, this case involves the failure to disclose criminal conduct of "a select group inherently suspect of criminal activities." *Marchetti*, at 57. The *Bouknight* rationale is, therefore, inapplicable.

In *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986) the Court of Military Appeals recognized that the privilege against compulsory self-incrimination may excuse a failure to report the illegal drug activity of others where the witness to drug use is culpably involved in the activity himself. *See United States v. Reed*, 24 M.J. 80 (C.M.A. 1987); *United States v. DuPree*, 24 M.J. 319 (C.M.A. 1987); *United States v. Thompson*, 22 M.J. 40 (C.M.A. 1986); U.S. Const., amend. V. The court dismissed the dereliction allegation in its entirety, despite the fact that

Heyward was involved in using drugs on only 3 of the 5 occasions that he failed to report. The court found that the members may have convicted Heyward of dereliction of duty for failing to report the same drug abuse to which he was a principal. Because such a conviction would violate Heyward's rights under the Fifth Amendment, the findings of guilty were disapproved.

In the instant case, requiring petitioner to report the drug abuse of those with whom she had used in the past would have necessarily resulted in her incriminating herself. The risk of self-incrimination was therefore very real and very appreciable. As a consequence, her conviction of dereliction of duty for failure to so report can not stand.

This case is unlike *United States v. Hoff*, 27 M.J. 70 (C.M.A. 1988), in which the United States Court of Military Appeals held that the privilege against compulsory self-incrimination did not excuse the failure to report others in whose criminal activity Hoff was involved only as an accessory after the fact. The court, in *Hoff*, arrived at its conclusion by reviewing the history of the offense of misprison of a felon and determined that the offense required more than mere silence but that additional affirmative acts underlie such prosecutions. *Hoff*, at 72; *see State v. Carson*, 262 S.E.2d 918 (S.C. 1980). Quite unlike the case at bar, Hoff was not involved in the underlying criminal conduct of those he subsequently protected. Hoff's additional "positive acts" in concealing the criminal conduct of his larcenous shipmates was determined to be separate and apart from the theft offenses that they committed. Here, however, petitioner's use of drugs was intertwined with the uses of the individuals that she was required to report.

In affirming petitioner's conviction, the Air Force Court of Military Review focused its analysis on the fact that the

findings of the trial court reflect that petitioner did not actually use drugs every time others in her company did. The court viewed petitioner's position as one only culpably involved in discreet instances, severable from other instances in which she was not so involved. The lower court stated that, while revealing the drug use of her co-actors would constitute "professional suicide", requiring that revelation did not violate petitioner's fundamental right to be free from compulsory self-incrimination.

Any hesitancy to report the drug use of these other individuals, however, was certainly not the product of petitioner's concern for her resumé. The uses of this group appear so intertwined that the entire process actually constituted an ongoing course of conduct, with each individual culpably involved at different specific times. Each discreet use was, therefore, intricately related to each other use. Because these uses were so closely related, no member could have reported the use of any of his co-actors without necessarily revealing his own involvement. Informing law enforcement agents of any aspect of this behavior would have necessarily and most certainly exposed the informant to *criminal* prosecution, not mere professional embarrassment.

The United States Court of Military Appeals agreed with the Court of Review, stating that ". . . the possibility of touching off a chain reaction that might come back to bite her [petitioner] is not the litmus test for self-incrimination." *United States v. Medley*, 33 M.J. 75, 77 (C.M.A 1991). Citing *California v. Byers, supra*, the Court of Military Appeals contended that:

> We have never intimated that it is lawful or excusable for a person in a position of military leadership to consciously ignore the blatant criminal conduct of subordinates. This classic duty not to tolerate mal-

> feasance cuts to the very core of military leadership and responsibility. It is a duty with respect to others that clearly exceeds the duty of ordinary citizens. *Cf.* R. Perkins and R. Boyce, *Criminal Law*, 742 (3d ed. 1982).

United States v. Medley, 33 M.J. 75, 77 (C.M.A. 1991). The court concluded that petitioner's noncommissioned officer status, therefore, provided a policy in favor of disclosure that overcame the infringement on petitioner's right to avoid compulsory self-incrimination.

That decision was clearly wrong—the violation of petitioner's constitutional right to avoid compulsory self-incrimination in this case was in no way overcome by petitioner's military status. The Air Force Court of Military Review recognized as much when it set aside the findings of guilty regarding the dereliction allegation relating to the times that petitioner actually used drugs with those whom she is accused of failing to report. A service member does not shed his or her rights under the Fifth Amemdment when the uniform is donned. If the military felt that petitioner's conduct was inconsistent with leadership, the appropriate response would be to remove her from her leadership position. The application of a patently unconstitutional criminal sanction, however, should not be permitted to stand under these circumstances.

As the Court of Review noted, the government received an "unexpected boon" when the members found petitioner guilty of failing to report uses on divers occasions, but guilty of using cocaine on but a single occasion. Apparently, Additional Charge I and Additional Charge II were originally charged in the alternative, i.e., either petitioner used cocaine with her friends or she was derelict by failing to report their use. Had she been found guilty as charged, even the prosecution conceded that the dereliction offense

would have failed and the military judge so instructed. (R. 265-266). It is manifestly unfair to penalize petitioner for the clearly unintended consequences of a jury's vote to partially acquit the accused.

The jury's findings merely excepted the words "on divers occasions", without specifying any more exact time for the presumably single use of which they convicted. (R. 282; App. Exh. XIX). The evidence in the case does little to clarify which of the numerous uses attested to by the prosecution witnesses was intended. The court members could have been referring to an alleged use at the home of Ellis Lindsey in August, 1987. (R. 82). The court could have intended to convict of an alleged use at the Overtime Hotel in the "fall of 1987". (R. 150, 163, 195). Perhaps the jury believed petitioner used cocaine at her own home in November of 1987. (R. 199-201). Or the court members may have had some other occasion in mind. It is simply impossible to determine from the vague testimony adduced at trial and the ambiguous findings of the court members to what specific date the finding of guilty regarding Specification 2 under Additional Charge I was directed. It is, therefore, unclear that petitioner was not convicted of dereliction for failing to report a use to which she was a principal. *Heyward, supra*, at 38.

Petitioner does not argue that culpable involvement with another necessarily vitiates any obligation to reveal even wholly unrelated criminal conduct by that other person. The application of the *Heyward* rationale necessarily requires a balancing of society's interest in ferreting out criminal conduct and the individual's fundamental right to be free from compulsory self-incrimination. *Heyward, supra*, at 37. Where, as here, however, the conduct is so closely related in both time and nature, how can it be said that petitioner would be able to make disclosures with respect to one incident without subjecting herself to at

least the potential of incriminating herself with respect to the other incidents? *See United States v. Brunton*, 24 M.J. 566, 571 (N.M.C.M.R. 1987). The Court of Military Review recognized this necessary balancing when it disapproved the findings of guilt regarding the allegation of dereliction for failure to report individuals using marijuana while petitioner apparently used cocaine. The question is "where shall the line be drawn?" Petitioner respectfully submits that, while there is no "bright line" answer to that question, where, as here, there exists a real and appreciable risk that the required disclosure will result in self-incrimination, the line should fall on the side of protecting the individual's fundamental rights.

CONCLUSION

The petitioner's case is worthy of Supreme Court review. In particular, this case offers a unique opportunity to address the military's authority to suppress a service member's constitutional right to be free from compulsory self-incrimination. Petitioner respectfully requests that this Honorable Court grant her Petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL D. BURT
Captain, Air Force Legal Services Agency
United States Air Force
AFLSA/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

JEFFREY R. OWENS
Colonel, Air Force Legal Services Agency
United States Air Force
Counsel for Petitioner

December 1991

APPENDIX A

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 28012

UNITED STATES

v.

SERGEANT ROSEMARY M. MEDLEY, FR 230-94-5489
UNITED STATES AIR FORCE

Sentenced adjudged 6 July 1989 by GCM convened at Langley Air Force Base, Virginia. Military Judge: Michael C. Callinan.

Approved sentence: Bad conduct discharge, confinement for two (2) years, forfeiture of six hundred dollars ($600.00) pay per month for two (2) years and reduction to airman basic.

Appellate Counsel for the Appellant: Mr. Ronald Douglas, Washington, D.C.; Colonel Richard F. O'Hair and Captain Michael D. Burt. Appellate Counsel for the United States: Colonel Joe R. Lamport, Colonel Robert E. Giovagnoni, Major Terry M. Petrie and Captain David G. Nix.

Before

BLOMMERS, KASTL and MURDOCK
Appellate Military Judges

DECISION

KASTL, Senior Judge:

Sergeant Rosemary Medley was found guilty of dereliction of duty and wrongful use of cocaine, violations of Articles 92 and 112a, UCMJ, stemming from events occurring from July 1987 to January 1988. The Government alleged that the appellant: (a) used cocaine at various times with other military members; and (b) observed these fellow service personnel using drugs on other occasions but failed to report it.[1]

Sergeant Medley asserts in her brief and in oral argument before us that *United States v. Heyward*, 22 M.J. 35 (C.M.A 1986), bars her conviction for all the dereliction of duty offenses. We disagree.

A Duty to Report Offenses and the "Heyward Exception"

A

Personnel are required by regulation to report to proper authority the use of drugs by other service members. Despite this, the *Heyward* case provides one narrow exception based on self-incrimination grounds:

> [W]e hold that where, at the time the duty to report arises, the witness to drug abuse is already an accessory or principal to the illegal activity that he fails to report, the privilege against compelled self-incrimination may excuse his non-compliance.

Heyward, 22 M.J. at 35.

---

[1] At trial, the parties stipulated that the duty to report the illegal use of drugs by military subordinates was imposed by Air Force Regulations 30-1, 30-2, and 39-2, as well as by a custom of the service.

The "*Heyward* exception" is of no benefit to this appellant. She was convicted of failing to report *only as to those occasions on which she herself did not use drugs.* In short, the *Heyward* exception is inoperative on the facts.

B

The appellant, however, seeks to cobble together another type of *Heyward* defense. In essence, her theory is this: "For purposes of this appeal, you can postulate that I am involved in occasional drug use with these friends. Sometimes I do drugs with them, other times I socialize with them but don't participate. Practically speaking it would be professional suicide for me to reveal any of their drug use—they will get even and tell about the times I *did* do drugs with them."

In our judgment, the appellant's argument is overcome by the *Heyward* rationale. In that case, Technical Sergeant Heyward used marijuana three times during a four-month period; *he also failed to report use by his companions on other occasions. Heyward*, 22 M.J. at 38. Anything which Sergeant Medley says in her behalf today could also be said for Technical Sergeant Heyward. Yet the Court of Military Appeals did not grant him relief on this basis. We find *Heyward* outcome-determinative. *See also United States v. Reed*, 24 M.J. 80 (C.M.A. 1987); *United States v. Thompson*, 22 M.J. 40 (C.M.A. 1986).

Neither can the appellant take comfort from *United States v. DuPree*, 24 M.J. 319 (C.M.A. 1987). That case involved a one time frolic by a guard; his prisoners' marijuana use was inextricably intertwined with appellant's misconduct in taking the prisoners off base, consuming alcohol with them, and failing to return them to jail on time. It was for this reason that his dereliction of duty conviction could not stand. *DuPree*, 24 M.J. at 321.

Perhaps the case offering the most hope to the appellant is *United States v. Brunton*, 24 M.J. 566, 571 (N.M.C.M.R. 1987). We find the case distinguishable on its facts; it involves co-conspirators operating in a narrow timeframe.

C

Other *Heyward*-type questions exist in this case. The appellant was convicted in Charge II, specification 2 of dereliction of duty for failing to report the *marijuana* smoking of her subordinates. On these same occasions, as we read the record, she was herself using *cocaine*. We believe it draws the line too finely to deny an accused the "*Heyward* defense" when he or she is using Drug A and subordinates are using Drug B. In our judgment, the *Heyward* defense is available to the appellant at this juncture.[2] Accordingly, the findings of guilty as to Charge II, specification 2 cannot stand.

One more matter should be mentioned in this regard: The Government won an additional and unexpected boon when findings were announced in this case. Additional Charge I, specification 2 and Additional Charge II are offenses charged in the alternative—it was the Government's theory that either the appellant had used cocaine or been derelict in not reporting use by her subordinates. The first of these twinned specifications was charged as occurring on "divers occasion." At trial, the appellant was found guilty, but only after the words "divers occasions" were

[2] "[W]hile I should not dream of asking where the line can be drawn, since the great body of the law consists in drawing such lines, yet when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall." Justice Oliver Wendell Holmes in *Schlesinger v. Wisconsin*, 270 U.S. 230, 241, 46 S.Ct. 260, 70 L.Ed. 557 (1926).

excepted by the voting members. In effect, this resulted in a finding of guilty on *one* occasion. A one-time cocaine use (Additional Charge I, specification 2) no longer stands as an alternative pleading, we believe, to divers failures to report (Additional Charge III). As a consequence, we believe that both findings may be sustained on the facts.

Other Matters

The case against the appellant was proved by the testimony of four witnesses. We are convinced that their evidence was more than sufficient for the members to find the appellant guilty of these matters. We, too, are convinced of her guilt.

The other assignments of error are resolved against the appellant. *United States v. Tyler*, 17 M.J. 381, 387 (C.M.A. 1984); *United States v. Everstone*, 26 M.J. 795 (A.F.C.M.R.) *pet. denied*, 27 M.J. 434 (C.M.A. 1988); *United States v. Rehberg*, 15 M.J. 691 (A.F.C.M.R.), *pet. denied*, 16 M.J. 185 (C.M.A. 1983).

The findings of guilty of Charge II, specification 2 are set aside. We shall reassess because of this matter and under our overall warrant to approve only so much of the findings and sentence as we find correct in fact and law.[3] Considering the record as a whole, we approve only so much of the sentence as extends to a bad conduct discharge, confinement for 14 months, forfeitures of $600.00 per month for 14 months, and reduction to airman basic.

---

[3] The approved sentence, we note, reduced the length of confinement from the adjudged four years to two years, as well as reducing forfeitures to a similar two-year period.

The findings of guilty and the sentence, both as modified, are correct in law and fact and, on the basis of the entire record, are

AFFIRMED.

Senior Judge BLOMMERS and Judge MURDOCK concur.

OFFICIAL:

/s/ Mary V. Fillman
MARY V. FILLMAN
Captain, USAF
Chief Commissioner

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

No. 64,801
ACM 28012

UNITED STATES, APPELLEE

v.

ROSEMARY M. MEDLEY, SERGEANT
U.S. AIR FORCE, APPELLANT

Argued January 10, 1991
Decided September 4, 1991

Military Judge: Michael C. Callinan

Counsel

For Appellant: *Captain Michael D. Burt (argued); Lieutenant Colonel Jeffrey R. Owens* (on brief); *Colonel Richard F. O'Hair.*

For Appellee: Captain Ann M. Mittermeyer (argued); *Lieutenant Colonel Brenda J. Hollis* and *Captain David G. Nix* (on brief); *Colonel Robert E. Giovagnoni.*

Opinion of the Court

COX, Judge:

Appellant stands convicted, contrary to her pleas, of three specifications of wrongfully using cocaine and one specification of being derelict in her duty to report cocaine use by other servicemembers, in violation of Articles 112a and 92, Uniform Code of Military Justice, 10 USC §§ 912a and 892, respectively.[1]

The Government's evidence showed that appellant was present at a number of parties and social outings where illegal drugs were consumed. The military judge instructed the general court-martial members that appellant could not be convicted of failing to report her fellow servicemembers for any occasion on which she herself participated in the drug usage. *See United States v. Heyward*, 22 MJ 35 (CMA), *cert. denied*, 479 U.S. 1011 (1986);

---

[1] Appellant also was convicted on dereliction of duty by her failure to report marijuana use at one of the times and places she was convicted of cocaine use. Relying on our opinion in *United States v. Heyward*, 22 MJ 35 (CMA), *cert. denied*, 479 U.S. 1011 (1986), the Court of Military Review set aside that specification ruling that

> it draws the line too finely to deny an accused that the "*Heyward* defense" when he or she is using Drug A and subordinates are using Drug B. In our judgment, the *Heyward* defense is available to the appellant at this juncture.

30 MJ 879, 881 (1990), *citing Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926) (Holmes, J.).

The court-martial sentenced appellant to a bad-conduct discharge, confinement for 4 years, forfeiture of $600 pay per month for 4 years, and reduction to Airman Basic. The convening authority reduced the confinement and forfeitures to 2 years each, but otherwise approved the sentence. The Court of Military Review, reassessing the sentence after dismissing one specification (*see* above), reduced the confinement and forfeitures to 14 months each, but affirmed the discharge and the reduction.

United States v. Thompson, 22 MJ 40 (CMA 1986). Concerning one of these drug events, the court-martial was convinced that she joined in using cocaine, so it acquitted her of the corresponding dereliction offense. Regarding another incident, the court-martial was satisfied that she was present, was aware of drug usage by the others but was not then using drugs herself, and failed to report the matter to proper authorities. Air Force Regulations 30-1, 30-2, and 39-6, as well as a custom of the service, require noncommissioned officers, among others, to report drug use that comes to their attention. *United States v. Medley*, 30 MJ 879, 880 n.1 (AFCMR 1990).

In *Heyward* and *Thompson*, we made it clear that a servicemember cannot be convicted of both using drugs and failing to apprehend or report others joining him *in the same drug usage.* We held this dual penalty would violate a servicemember's rights against compulsory self-incrimination. Art. 31, UCMJ, 10 USC § 831; and U.S. Const. amend. V. We recognized, however:

> Due to contingencies of proof, *it may be warranted in some cases to charge an accused both with dereliction of duty for failure to report an offense and with the offense that he failed to report.* Nevertheless, we see no need to allow an accused to be convicted of both.

2 MJ at 37 (emphasis added).

Heyward, unlike appellant, was convicted of using illicit drugs and of failure to report others' use at the same time and place. We held:

> The Government proved that on three occasions appellant was a principal to marijuana use by the same Air Force members that he failed to report. The Government also introduced evidence that appellant was present on two other occasions when marijuana

> was used but he did not partake himself. *Thus appellant could properly be convicted of both use of marijuana on three occasions and dereliction of duty for failure to report drug use by others on the two occasions when he was not involved as a principal.*

22 MJ at 38 (emphasis added).

In effect, appellant now asks us to modify the *Heyward* rule and extend it to the instant facts. As she did before the Court of Military Review, she contends that the dereliction charge should be dismissed due to the social relationship among her co-actors. Her contention, essentially, is that the on-going drug activities of her social circle were so interrelated that it would have been impossible for her to report one incident without potentially incriminating herself with respect to the other incidents. *See United States v. Brunton*, 24 MJ 566 (NMCMR 1987).

From a practical standpoint, her argument has some logic. An acknowledgment, without more, of a friendly association with drug users *might* suggest to the Government a link between her and drugs.[2] Furthermore, denouncing the others' use of drugs could, under some circumstances, establish her ability to recognize cocaine, prejudicing a claim of innocent ingestion. *See United States v. Mance*, 26 MJ 244 (CMA) (knowledge of illicit nature of substance is element of offense), *cert. denied*, 488 U.S. 942 (1988).[3] Primarily, however, the logic of the argument is that appellant might expect retaliation from her "friends" if she betrayed them. Thus, given her obvious vulnerability, appellant had little real incentive to inform on her friends.

---

[2] It might equally suggest that she was a person who was willing to place duty above friendship.

[3] However, since appellant's use convictions were based on testimony that she "snorted" a "white, powdery substance," the innocent-ingestion defense, in 1987 A.D., is quite academic.

However, the possibility of touching off a chain reaction that might come back to bite her is not the litmus test for self-incrimination. Where a reporting requirement calls for "a compelled disclosure that has an incriminating potential," resolution of the issue depends on "str[ength of the] policies in favor of a disclosure called for by [the] statutes." *California v. Byers*, 402 U.S. 424, 427, 428 (1971) (plurality opinion). *See United States v. Heyward, supra* at 37 (fact that "the information disclosed may focus attention on the reporting servicemember and may eventually lead to criminal charges being brought against him . . . alone does not invalidate the reporting requirement"); *cf. United States v. Sievers*, 29 MJ 72 (CMA 1989).[4]

We must be careful in these cases not to overlook the military purpose of the duty to report drug offenses (or any offenses or negligent conduct, for that matter). Military leaders have a fundamental obligation to intervene and prevent criminal or negligent conduct. *See* RCM 302(b)(2), Manual for Courts-Martial, United

---

[4] Admittedly, the specifications as drafted were no models of clarity, spanning as they did lengthy and overlapping time frames. *See United States v. Reed*, 24 MJ 80, 83 (CMA 1987). The record of trial, however, reveals that each of the specifications of which appellant was convicted represented a different drug event, each at a different location. The defense was fully aware of which specification referenced which event, and there was no defense request for clarification. The court members were clearly apprised of both the nature of the allegations and the fact that appellant could not be convicted of failing to report drug offenses if she were a principal to that use. Thus, this case differs from *Reed* in two ways. First, unlike the military judge's providence inquiry in *Reed*, which convinced then-Judge Sullivan that the *Heyward* doctrine was "not satisfactorily resolve[d]", 24 MJ at 83, this case was litigated on the merits, and the members were properly instructed.

Second, the Air Force Regulation, unlike the Navy Regulation in *Reed*, is not unduly broad. *United States v. Reed, supra* at 83-86 (Everett, C.J., concurring). *See United States v. Heyward, supra.*

States, 1984. While we have expressed our reluctance to permit the criminal prosecution of servicemembers who fail to carry out the physical arrest or apprehension of other servicemembers, our concerns were based primarily on the lack of training, experience in law enforcement and definitive "notice" of what to do when, rather than on the proposition that there is no duty to act at all. *United States v. Thompson, supra* at 41; *see also United States v. Heyward, supra*, at 38, 39 (Everett, C.J., concurring).

We have never intimated that it is lawful or excusable for a person in a position of military leadership to consciously ignore the blatant criminal conduct of subordinates. This classic duty not to tolerate malfeasance cuts to the very core of military leadership and responsibility. It is a duty with respect to others that clearly exceeds the duty of ordinary citizens. *Cf.* R. Perkins and R. Boyce, *Criminal Law* 742 (3d ed. 1982).

Thus, under the framework of *California v. Byers, supra*, we have no hesitation in validating appellant's duty to report her subordinates' criminal conduct, notwithstanding the fact that she was found to have joined them in crime on other occasions.[3] The policy basis for reporting misconduct in the military is more than powerful; it is axiomatic. On these facts, and in view of the adroit handling of the instructions by the military judge, we agree with the Court of Military Review, when it said:

> The "*Heyward* exception" is of no benefit to this appellant. She was convicted of failing to report *only*

---

[3] We have not had occasion to decide whether, in the event the Government elects to prosecute a servicemember for offenses discovered subsequent to his obligatory report on others, "the Government's burden [would be] heavy in showing that the evidence later provided" against the accused was "not the product of" his report on others. *See United States v. Boyd*, 27 MJ 82, 86 (CMA 1988) (Everett, C.J., concurring). In the instant case, of course, appellant did not report on the others, so we are not confronted with this question.

as to those occasions on which she herself did not use drugs. In short, the *Heyward* exception is inoperative on the facts.

30 MJ at 880.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN concurs.

EVERETT, Senior Judge (concurring):

The regulatory requirement of the various military departments that purports to place on *all* personnel the duty to report to higher authority any and all incidents of drug use by fellow servicemembers is troubling to me. For this reason, I wrote separately in *United States Heyward*, 22 MJ 35, 38 (CMA), *cert. denied*, 479 U.S. 1011 (1986), and later in *United States v. Reed*, 24 MJ 80, 83 (CMA 1987), in order to make clear my analysis of this alleged duty. I do so again here.

Air Force Regulation (AFR) 30-1, Personnel, Air Force Standards (4 May 1983), claims to impose a blanket drug-use reporting duty on all Air Force personnel. Paragraph 10b charges every airman, "You are responsible for (1) reporting all known or suspected incidents of drug abuse by others and (2) encouraging persons known to you to have an existing or potential drug abuse problem to seek assistance through the Air Force Rehabilitation Program." *See* para. 3-17, AFR 30-2 (18 April 1986). In regard to what offenses must be reported, this provision is more focused than the language of Article 1139 of U.S. Navy Regulations (1973) that was at issue in *Reed*. Thus, arguably it provides the constitutionally mandated notice that was missing there. *See* 24 MJ at 84 (Everett, C.J., concurring). Nonetheless, to me, it remains suspect in

terms of notice because—as I discussed both in *Heyward* and in *Reed*—to the extent the reporting requirement would apply to even the lowest ranking member of the Air Force, it deviates greatly from the expectations of citizens generally at common law and in virtually all state jurisdictions.

Furthermore, again to the extent that this blanket regulatory provision purports to burden even the lowest ranking member of the service, I conclude that the "'police state'" connotations of such an obligation render the provision too broad even considering "the interests of military necessity." *See United States v. Reed, supra* at 85.

Appellant, however, is *not* "the lowest ranking member of the" Air Force; she is a sergeant—a noncommissioned officer. As I implied in *Heyward* and in *Reed*, I believe that the military can expect its leadership, both commissioned and noncommissioned officers, to meet a higher level of responsibility than can logically or legally be imposed on the military's citizenry at large.

Moreover, at her court-martial, appellant stipulated to the following:

> As a noncommissioned officer, the accused had a certain prescribed duty, that is, to report to proper military authorities the wrongful use of illegal drugs by persons subordinate in rank to the accused, and known to her to be members of the United States Air Force.

Thus, not only did "the Government . . . prove that the Air Force intended that appellant, as a noncommissioned officer, have a duty to report drug use by others," but it also proved "that appellant knew . . . that [s]he was subject to this duty." *See United States v. Heyward, supra* at 38 (Everett, C.J., concurring).

Accordingly, because appellant was part of the Air Force's leadership corps and because she knew that, as part of that corps, she had a duty to report to higher authority any drug use by others, I join the majority's opinion here.

U.S. GOVERNMENT PRINTING OFFICE: 1991 591008